

1407712 (Migration) [2015] AATA 3125 (14 July 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs Loi Thi Hiep Nguyen

VISA APPLICANTS: Mr Van Tuong Phan
Master Van Dien Phan
Master Thanh Dat Phan

CASE NUMBER: 1407712

DIBP REFERENCE(S): OSF2013/027571

MEMBER: Michael Cooke

DATE: 14 July 2015

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations
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- The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the second named visa applicants meet the following criterion for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.311 of Schedule 2 to the Regulations

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- Statement made on 14 July 2015 at 2:35pm

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 20 February 2014 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 28 June 2013 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211 of the Regulations.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 of the Regulations because the delegate was not satisfied the parties met the definition of spouse.
4. The review applicant/sponsor's representative submitted additional information to the Tribunal clarifying, explaining and rebutting adverse findings in the delegate's decision record and forwarding information pursuant to reg.1.15A (T1, ff.42-87)..
5. The review applicant appeared before the Tribunal on 13 July 2015 to give evidence and present arguments. The Tribunal was assisted by a Vietnamese language interpreter.
6. The review applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the parties met the definition of spouse at time of application and decision.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

9. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian permanent resident.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This

includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. On the evidence (a Vietnamese marriage certificate), the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

- Financial aspects of the relationship – including joint ownership of assets, and joint liabilities; extent of pooling of financial resources, any legal obligations owed to the other party; any sharing of day-to-day household expenses.
12. The Tribunal accepts that the parties live in different countries. Despite this the sponsor claimed that the applicant has sent her AUD\$2000 on two occasions and she had sent him AUD\$2000 she claimed at the hearing. At the same time she has travelled 10 times to Vietnam since December 2010 and incurred a debt to her brother in law of AUD\$20,000. The Tribunal accepts that despite their geographical separation there has been some financial sharing/pooling between the parties.
 - Nature of the household – including any joint responsibility for care and support of children, parties' living arrangements; and any sharing of housework.
 13. The Tribunal accepts that the parties live in different countries. Nevertheless the applicant has lived in Vietnam with the applicant on the many occasions when she has visited the applicant. She has evidenced and claimed to have the appropriate household registrations required by the Vietnamese Government for foreigners. The applicant has custody of two of his older children and the youngest one lives with his ex-wife. The applicant has two children of her own. They have met the applicant.
 14. She informed at the hearing that when the applicant arrived in Australia the plan is for him to move into his brother's home. The sponsor informs that the applicant's sister will move to live with and care for her aged parents so allowing sufficient room for the applicant and his children. The Tribunal accepts that within the geographical circumstances they have maintained a household.
 - Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
 15. The Tribunal is satisfied from photographic and telephone traffic evidence that the parties are accepted as married by their respective families and represent themselves to other people as being married to each other.
 - Nature of persons commitment to each other - including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
 16. The parties have been married for 3 years and the sponsor has visited 10 times to Vietnam since December 2010 - incurring a substantial debt to her brother in law. The marriage of the

parties appears to have been conducted in the appropriate ceremonial way and encompassed 200 guests. The sponsor has elaborated at length to the Tribunal their plans for the future of their blended family in the hearing. The Tribunal is satisfied the parties have a commitment to each other and see the relationship as long-term.

- Any other relevant considerations

17. The delegate was correct in his decision when he suggested that the applicant could not have met the sponsor in Australia the first time in question (in September) as the sponsor was absent overseas from 12 July 2010 until 9 October 2010. He seemed confused, however, about the actual month when interviewed.
18. The sponsor was in Australia as claimed by the applicant. The party at which they met was in late October 2010 not September she claims as the applicant claimed to the Department. Movement Records indicate that the sponsor was in Australia from 1 August 2010 to 28 October 2010 so his insistence to the delegate that he had met the applicant in Australia is entirely plausible. The sponsor has claimed in the hearing that the applicant is forgetful. The sponsor accounts for this because the applicant is a simple person of limited education and who works as a prawn farmer in aquaculture. He had (mistakenly) claimed to the delegate that he met her in September. The Tribunal has revisited the interview summary. There is evidence he was confused but on balance told the truth. In view of the fact that the delegate's interview took place in February 2014 the Tribunal accepts it is possible he has had a memory failure and that they did meet at the party as claimed.
19. Furthermore, the delegate claimed in his decision that the applicant's brother (the person who lent the sponsor the AUD\$20,000) was not at the wedding. The sponsor's adviser has subsequently informed the Tribunal (through additional information) that this person (Mr PHAN Van Luong) did travel to Vietnam for the wedding. Her representative has provided his flight details indicating that he left Australia on 29 December 2011 returning on 11 January 2012. (T1, ff.58-9). The wedding took place on 8 January 2012. He is also the person in the pinstripe suit who can be seen in the family wedding celebration photos at (T1.f.93).
20. The Tribunal has considered r.1.15A(3) matters and the full circumstances of the relationship. The Tribunal finds that the parties have a mutual commitment to shared life to the exclusion of others and a genuine and continuing relationship where they live together or not separately and apart on a permanent basis. The Tribunal finds they meet s.5F(2)(b)-(d) and the definition of spouse.
21. Given these findings the Tribunal is satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship.
22. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
23. In respect of the secondary applicants the Tribunal finds that as the applicant now meets the primary criteria the applicants now meet cl.309.311 of the Regulations.
24. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

25. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations

The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the second named visa applicants meet the following criterion for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.311 of Schedule 2 to the Regulations

Michael Cooke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).